
De Minimis Determinations – Statutory Overview

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Regulation of Hazardous Air Pollutant Sources :

- A.R.S. § 49-426.06 (B):
 - “... a person shall not commence the construction or modification of a source that is subject to this section without first obtaining a permit or permit revision ...”

A.R.S. § 49-401.01 (11)

- **“Construction”** means any physical change in a source or change in method of operation of a source including fabrication, erection, installation or demolition of a source that would result in a change in actual emissions.”

A.R.S. § 49-401.01 (24)

- “**Modification** or modify” means a physical change in or change in method of operation of a source which increases the actual emissions of any regulated air pollutant emitted by such a source by more than any relevant de minimis amount or which results in the emission of any regulated pollutant not previously admitted by more than such de minimis amount.”
- If change is not above de minimis amount, it is not a modification requiring a permit

A.R.S. § 49-426.06 (B)

- “For purposes of determining whether a change constitutes a modification, the director shall by rule establish appropriate de minimis amounts for hazardous air pollutants that are not federally listed hazardous air pollutants. In establishing de minimis amounts, the director shall consider any relevant guidelines for criteria promulgated by the administrator.”
 - Directs ADEQ to establish de minimis amounts for non-federally listed hazardous air pollutants.
 - Silent on establishment of de minimis amounts for federally listed hazardous air pollutants.
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A.R.S. § 49-426.06 (A)

- “... the director shall by rule establish a state program for the control of hazardous air pollutants that meets the requirements of this section.”
 - ❑ Director must determine the rules needed to meet the requirements of this section.
 - ❑ In order to determine whether a change is a modification, the Director may determine relevant de minimis amounts.
 - ❑ ADEQ's establishment of de minimis amounts in order to regulate modifications is consistent with the statutory framework.
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Presumptive de minimis?

- For purposes of Arizona law, does EPA's failure to establish de minimis amounts establish those amounts at zero?
- Statute assumed EPA would be developing de minimis amounts.
 - ARS §49-426.06(B) – “In establishing de minimis amounts, the director shall consider any relevant guidelines for criteria promulgated by the [EPA] administrator.”

Presumptive de minimis?

- Federal program - as adopted by EPA, program does not regulate modifications. 40 CFR 63.40 – 63.56
 - 40 CFR 63.40; 61 F.R. 68384: “This rule does not require new source MACT for modifications to existing sources.”
 - Because the program does not regulate modifications, EPA did not establish de minimis amounts.
- EPA did not determine that the de minimis amounts are zero.

Presumptive de minimis?

- Arizona's statutes do not require ADEQ to adopt EPA de minimis levels.
- Rather, statutes require ADEQ to “consider any relevant [EPA] guidelines.”